[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IMPLICIT, LLC,	§	
	§	
Plaintiff,	§	Civil Action No. 2:18-cv-53-JRG
	§	LEAD CASE
v.	§	
	§	JURY TRIAL DEMANDED
NETSCOUT SYSTEMS, INC.,	§	
	§	
Defendant.	§	

IMPLICIT, LLC,	§	
	§	
Plaintiff,	§	Civil Action No. 2:18-cv-54-JRG
	§	MEMBER CASE
v.	§	
	§	JURY TRIAL DEMANDED
SANDVINE CORPORATION,	§	
	§	
Defendant.	§	

DEFENDANTS NETSCOUT SYSTEM, INC. AND SANDVINE CORPORATION'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT

[redacted]

Plaintiff Implicit, LLC ("Implicit")'s infringement claims against Sandvine and NetScout should be disposed of on summary judgment for one reason: not a single one of the six Accused Products operates on any packet whose outermost header is a TCP header. All Asserted Claims include a limitation requiring either (1) a system that can "execute a Transmission Control Protocol (TCP)," which the Court construed to mean "operate on one or more packets whose outermost header is a TCP header," and/or (2) a system that can "convert one or more packets having a TCP format into a different format," which the Court construed to mean "convert the outermost header structure of the packet(s) from TCP to another type of header structure." Dkt. No. 111, at 35.[1] While Implicit provides a number of different angles in its Opposition, not a single one identifies any packet whose literal[2] outermost header is a TCP header, which is a prerequisite under both of the Court's claim constructions:

First, Implicit ignores Dr. Almeroth's testimony where he repeatedly and consistently described Implicit's infringement theory in terms of the "perspective" of a processing routine as purportedly defining the outermost header of the packet, rather than looking at the headers on the packet itself and determining which is literally the outermost. Defendants recited multiple excerpts of Dr. Almeroth's testimony at pages 16-17 of the Motion. Implicit does not even acknowledge this "perspective" testimony because it is damning evidence of the absence of any packet with TCP as the literal outermost header. Dr. Almeroth would not need to rely on "perspectives" if an actual packet had TCP as a literal outermost header.

[1] Absent a packet that has an outermost header structure of TCP, the "converting" limitations cannot be satisfied, which reduces this motion to a single issue.

[2] Defendants emphasize the "literal" requirements of the Court's claim constructions throughout this brief to highlight that Implicit is really presenting, *sub silentio,* an equivalence argument. Implicit waived any equivalents approach by failing to disclose it in either its Infringement Contentions or expert report on infringement.

[redacted]

Second, Implicit does not dispute the structure of the packets in the Accused Products, nor [redacted] as detailed in Defendants' Statement of Material Undisputed Facts. Dkt. 154 ("Opp.") at 11-12. If there were an actual packet that had TCP as an outermost header, Implicit would have easily disputed Defendants' Statement rather than disagreeing over "characterizations."

Third, Implicit contends, [redacted] Opp. at 17. Thus, according to Implicit, a [redacted]. As Defendants described in their opening Motion, Implicit's approach of pointing to constructs (like pointers) outside the packet to characterize the packet voids the Court's claim construction by ignoring the packet's literal "outermost header." *See* Motion, at 17-18. If there were an actual packet that had TCP as a literal outermost header, Implicit would not have to rely on such non-literal abstractions.

Fourth, Implicit seeks to side-step the fact that its "perspective" approach does not meet the literal language of the Court's construction by arguing that the "Court's exclusion" applies to scenarios that use *only* pointers to access a packet. Opp. at 14-15. Thus, according to Implicit, if a system uses some "other structures" in addition to pointers, the "Court's exclusion" does not apply and Implicit's theory is good to go to trial. *Id.* It is not clear what Implicit is talking about, but what is clear is that the Court affirmatively construed Implicit's claims to literally require that TCP is a packet's "outermost header." This is an affirmative requirement that Implicit must demonstrate to avoid summary judgment. Implicit does not and cannot point to any packet that has TCP as a literal outermost header.

[redacted]

Fifth, Implicit loosely argues there are other "data structures that Dr. Almeroth identifies as the 'packets' on which the Accused Products operate on and convert from TCP to another format." Opp. at 17. It is telling that Implicit placed quotation marks around "packets" in its argument, because the other data structures that Dr. Almeroth identifies are not packets. Defendants address this in detail below on a per product basis.

Sixth, Implicit focuses its response on the notion of conversion – namely conversion to [redacted] Opp. at 18-20, 21-22. Even if that were true (it is not), this again ignores the Court's literal claim constructions. If the packet that is operated on to [redacted] does not have TCP as the outermost header, there is no "executing a TCP" under the Court's claim construction. Implicit cannot show any packet in the Accused Products whose outermost header is TCP either before or after this alleged "conversion."

Finally, Implicit spends most of its argument section on a single product – Sandvine's PTS. As detailed below, each of the Accused Products is distinct. There are two distinct cases here with six distinct products. Implicit's one-size-fits-all approach is further exposed by the details below:

GeoProbe: In the cited portions of his report (¶¶144-149, Opp. at 20), Dr. Almeroth identifies "processing at a level wherein the outermost header is TCP" where the processing routines [redacted] of SOF 4-5. Dkt. 142-1 ("Almeroth Report") at ¶146. The [redacted]. SOF 4-5, Ex. 16[3], Almeroth Dep. at 65:4-19, 70:3-11. Dr. Almeroth identifies

[3] The Exhibit numbers are consecutively numbered continuing from Defendants' Opening Brief.

[redacted]

three other data structures, which, by his own characterization, are not packets with an outermost header of TCP even under Dr. Almeroth's non-literal approach.[4]

When questioned on GeoProbe, Dr. Almeroth repeatedly articulated that TCP is the outermost header, not because it is the literal outermost header on any packet, but because TCP is the outermost header from "the perspective of the processing module:"

> Q. Regardless of whether there are other portions of the packet, earlier headers that are still in existence in memory?
> A. Yeah. I mean, I understand that this is a point Dr. Jeffay is trying to make. And, I mean, the reality is that, [redacted]
> I mean, you know, to the extent that Dr. Jeffay is pointing to ***the fact that*** [redacted]

Ex. 16, Almeroth Dep. at 65:4-19. When asked about the very portions of his report that Implicit cites, Dr. Almeroth did not identify any alternative packet (to the received packet described by Defendants) that has TCP as an outermost header. Instead, he explained his non-literal "perspective" theory, including when shown a diagram nearly identical to the diagram in SOF 4:

> Q. Do you agree that that's an accurate illustration of the extended packet descriptor?
> A. Not necessarily.
> Q. How do you disagree with it?
> A. … [redacted] ***from the perspective of the execution of that module, the TCP header is the outermost header***. It's operating on that header.

Ex. 16, Almeroth Dep. at 66:17- 67:7 (objections omitted); *see also id.* at 59:23-61:18, 61:24-63:4, 64:17-65:3, 68:20-69:16, 70:3-11. Implicit cannot point to any packet in GeoProbe that has TCP

[4] Almeroth Report, at [redacted]

[redacted]

as its outermost header. Summary judgment as to the GeoProbe Accused Products is appropriate.

InfiniStream: In the cited portions of his report (¶¶181, 188-89, Opp. at 20), Dr. Almeroth discusses the [redacted] (described in SOFs 8-11). The [redacted]. SOF 8-11; Ex. 16, Almeroth Dep. at 88:4-7 [redacted], 88:18-89:7. Dr. Almeroth also mentions [redacted]

[redacted]

Ex. 17, 5/21/19 Barrett Dep. Tr., at 169:21-170:4 (cited in Almeroth Report at fn. 240) (emphasis added); *see also* Ex. 18, Jenkins Dep. Tr. at 23:23-25:5 (cited in Almeroth Report at fn. 240). [redacted] The other data structures identified by Dr. Almeroth in ¶¶181, 188-189, by his own characterization, are not packets with an outermost header of TCP even under Dr. Almeroth's non-literal approach.[5]

When asked about the very portions of his report that Implicit cites, Dr. Almeroth did not identify any alternative packet (to the received packet described by Defendants) that has TCP as an outermost header. Instead, he reiterated his non-literal "perspective" theory, including when shown a diagram nearly identical to the diagram in SOF 10:

[5] Almeroth Report, at ¶¶170, 176 [redacted]; ¶181 [redacted].

[redacted]

Q. Why would a function that is looking at the HTTP header information have TCP as the outermost header?
A. Because it's also looking at the TCP header. . . . ***You'd have to look at what*** [redacted], which is essentially what that footnote 240 says.

Ex. 16, Almeroth Dep. at 93:23-94:21.

Q. Is that a fair representation of the [redacted]?
A. So I would agree that -- my recollection is that [redacted]

Id. at 88:14-89:7. Implicit cannot point to any packet in InfiniStream that has TCP as its outermost header. Summary judgment as to the InfiniStream Accused Products is appropriate.

Arbor: In the cited portions of his report (¶¶211-213, Opp. at 20), Dr. Almeroth identifies [redacted] Almeroth Report at ¶213. In Dr. Almeroth's "perspective" world, the TCP header is the outermost header, [redacted] "because the processing occurs at [the TCP] layer."

Regardless, the [redacted]. Almeroth Report at fn. 343 [redacted]. A TCP header by itself is not a packet at all, much less a packet with an outermost header of TCP. Ex. 19, Almeroth Rebuttal Report at ¶773 ("[redacted]

[redacted]

[redacted].”). *See also* Implicit Opening Claim Construction Brief, Doc. No. 89, at 18 (explaining an “example packet”). When questioned about this portion of his report, Dr. Almeroth reiterated his “perspective” theory, including when shown a diagram from SOF 15:

> Q. How does processing by the [redacted] constitute processing at a layer wherein the outermost header is TCP?
> A. As that footnote points to, it's pointing to the source code, and it shows that [redacted] but, again, we can look at the source code and I can confirm that that's what it's doing.
> [redacted]

Ex. 16, Almeroth Dep. at 102:6-103:4.

> Q. Dr. Jeffay provides a diagram illustrating [redacted]. Do you agree with the depictions in that paragraph?
> A. … [W]ith respect to the [redacted]

Id. at 100:23-101:11. Implicit cannot point to any packet in Arbor that has TCP as its outermost header. Summary judgment as to the Arbor Accused Products is appropriate.

PacketLogic: In the cited portions of his report (¶¶335-336, Opp. at 20), Dr. Almeroth identifies the [redacted] of SOF 19-21. Almeroth Report at ¶335. It is undisputed that the [redacted]. Ex. 16, Almeroth Dep. at 125:6-19.

In ¶335, Dr. Almeroth also identifies [redacted]

[redacted]

[redacted] Almeroth Report at ¶335 ([redacted]"). [redacted] is not a packet with an outermost header of TCP as explained above in the Arbor section.

The only other data structures identified in ¶¶335-336 ([redacted] are, by Dr. Almeroth's own characterization, used to [redacted] Almeroth Report at ¶336. These structures are not packets with an outermost header of TCP. Implicit cannot point to any packet in PacketLogic that has TCP as its outermost header. Summary judgment as to the PacketLogic Accused Products is appropriate.

NAVL: In ¶¶365, 372-373 (cited in Opp. at 20-21), Dr. Almeroth describes the [redacted] Almeroth Report at ¶¶372-373. Dr. Almeroth does not contend that [redacted] includes, creates, or otherwise defines a packet whose outermost header is TCP.

Dr. Almeroth also identifies the [redacted]" Almeroth Report at ¶373. Dr. Almeroth opines that the TCP header is outermost simply because the processing occurs at layer 4 and utilizes information in the TCP header of the received Ethernet packet. Ex. 16, Almeroth Dep., at 133:20-25, 134:7-15; *see also* Almeroth Report at ¶365 ("This processing *utilizes* TCP as the outermost header[.]"). Dr. Almeroth does not identify any packet with TCP as the literal outermost header. Summary judgment is appropriate as to the NAVL Accused Products.

[redacted]

PTS: Implicit focuses much of its argument on Sandvine's PTS. Implicit alleges that the packet that the TCP routines operate on is "[redacted]." Opp. at 18 (citing Almeroth Report at ¶¶ 268–278). First, as the name overtly states, [redacted] Ex. 12, Faiczak Dep. at 70:7-72:7. It is not a packet that has an outermost header of TCP. [redacted] *Id.* at 146:2-13. A TCP header is not a packet that has TCP as the outermost header as explained above in the Arbor section. *See also id.* at 146:17-147:14. Implicit has not identified any packet that has TCP as an outermost header.

Dr. Almeroth explains his infringement theory in the same paragraph that he discusses the [redacted] -- not because it is literally the outermost header on any packet, but "[redacted] Almeroth Report at ¶278. Implicit ignores Dr. Almeroth's actual opinions entirely. Dr. Almeroth plainly testified as to his "perspective" theory. Ex. 16, Almeroth Dep., at 115:130-116:11 ("[redacted]."); 116:18-117:5 ("[H]aving looked at the particular accused products and the way that they view the L4 processing of the TCP header, [redacted].").

Implicit relies on a document that describes the operation of the PTS [redacted] Opp. at 19. Mr. Faiczak was questioned extensively about this document and

[redacted]

testified that [redacted] Ex. 20, Faiczak Dep. at 134:10-22 ("So again, that is similar to what we explained before. You know, [redacted]); 126:20-128:17 [redacted]."); 136:21-139:1; Ex. 12, at 71:2-17 ("So we're, when I say [redacted] Dr. Almeroth does not provide any "source-code level analyses" regarding this operation. Almeroth Report, at ¶291. If there was a packet in PTS that had its Ethernet and IP headers [redacted] in the way Implicit implies, Implicit would simply point to a packet that has TCP as its outermost header after this processing. It does not do so because no such packet exists in the PTS.

Finally, Implicit alleges that "[redacted]." Opp. at 20. This statement is completely false and both Implicit (in its brief) and Dr. Almeroth (in his report) bury the truth in a footnote: "[redacted]" Almeroth Report, at ¶276 (fn. 561); Opp. at fn. 8. The [redacted] that Dr. Almeroth identifies contain [redacted] Defendants' Statement of Facts is undisputed – the PTS operates [redacted] Dr. Almeroth's "perspective" theory ignores the Court's literal claim construction. Dr. Almeroth does not identify any packet with TCP as the literal outermost header. Summary judgment is appropriate as to the PTS Accused Products.

[redacted]

Dated: October 16, 2019

Respectfully submitted,

/s/ *Mark C. Lang*

Eric A. Buresh (KS Bar 19895)
Mark C. Lang (KS Bar 26185)
ERISE IP, P.A.
7015 College Blvd., Suite 700
Overland Park, Kansas 66211
Telephone: (913) 777-5600
Facsimile: (913) 777-5601
eric.buresh@eriseip.com
mark.lang@eriseip.com

Abran J. Kean (CO Bar 44660)
ERISE IP, P.A.
5600 Greenwood Plaza Blvd., Suite 200
Greenwood Village, CO 80111
Telephone: (913) 777-5600
abran.kean@eriseip.com

Melissa Smith
Texas State Bar No. 24001351
melissa@gillamsmithlaw.com
GILLAM & SMITH, L.L.P.
303 South Washington Avenue
Marshall, Texas 75670
Telephone: 903-934-8450
Facsimile: 903-934-9257

Counsel for Defendants
NetScout Systems, Inc. and
Sandvine Corporation

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was served on counsel for all parties appearing in this action via the Court's electronic filing system on October 16, 2019.

/s/*Melissa R. Smith*
Melissa R. Smith

[redacted]